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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77- 77-602

ARCO PIPE LINE COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, DEPARTMENT OF ENERGY, AND FEDERAL ENERGY REGULATORY COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Of Counsel:

JOHN T. UPDEGRAFF
ARCO Pipe Line Company
ARCO Building
Independence, Kansas
67031

ROBERT E. JORDAN, III
JAMES H. PIPKIN, JR.
STEVEN H. BROSE
STEPTOE & JOHNSON
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 862-2000

Attorneys for Petitioner
ARCO Pipe Line Company

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner ARCO Pipe Line Company respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on July 29, 1977, in consolidated proceedings styled *Mobil Alaska Pipeline Company* v. *United States of America and Interstate Commerce Commission*, Nos. 77-2392, 77-2412, 77-2421 and 77-2437, 557 F.2d 775 (5th Cir. 1977). Petitions for certiorari with respect to that judgment have heretofore been filed with this Court in *Mobil Alaska Pipeline Co.* v. *United States*, No. 77-452; *Exxon Pipeline Co.* v. *United States*, No. 77-457; and *BP Pipelines Inc.* v. *United States*, No. 77-551.

OPINIONS BELOW

On July 29, 1977, the United States Court of Appeals for the Fifth Circuit, by a divided panel, denied various requests for interlocutory relief, and dismissed four petitions for review of an order of the Interstate Commerce Commission entered in Investigation and Suspension Docket No. 9164, *Trans Alaska Pipeline System (Rate Filings)*. The opinion of the Fifth Circuit, and the separate dissenting opinion of Judge Roney, are set forth at Appendix A.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1), 2350(a). This petition is filed within ninety days of July 29, 1977, the date on which the judgment of the Court of Appeals was entered.

QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission may avoid the plain statutory prohibition against the prescription of rates without a full hearing, by styling such prescription as the waiver of part of its power to suspend rates.

2. Whether the rate-making framework embodied in the Interstate Commerce Act vests in the Commission the power to suspend initial rates.

3. Whether the Commission has the power to order a refund condition with respect to initial rates, in the face of the express statutory limitation of that power to "changed" rates.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutory provisions most directly involved are Sections 15(1) and 15(7) of the Interstate Commerce Act, 49 U.S.C. §§ 15(1), 15(7). Also involved is the fifth

amendment to the Constitution of the United States. These provisions are set forth in full at Appendix C.

STATEMENT OF THE CASE

Petitioner ARCO Pipe Line Company ("ARCO Pipe Line") is the owner of a 21.0 percent undivided interest in the Trans Alaska Pipeline System ("TAPS"),[1] an 800-mile crude oil pipeline extending from Prudhoe Bay on the Alaskan North Slope, to the Port of Valdez on the Gulf of Alaska. Construction of TAPS was authorized in November 1973 by the Trans-Alaska Pipeline Authorization Act.[2] Construction commenced in early 1974 and was completed in June 1977 at a total cost of approximately $8 billion.

On May 31, 1977, ARCO Pipe Line filed with the Interstate Commerce Commission ("ICC" or "Commission") its initial tariff for crude oil transportation between Prudhoe Bay and Valdez, to become effective on June 30, 1977.[3] The tariff stated a rate of $6.04 per

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[1] The other owners of undivided interests in TAPS are Amerada Hess Pipeline Corp. (1.5 percent), BP Pipelines Inc. (15.84 percent), Exxon Pipeline Co. (20.0 percent), Mobil Alaska Pipeline Co. (5.0 percent), Phillips Alaska Pipeline Co. (1.66 percent), Sohio Pipe Line Co. (33.34 percent), and Union Alaska Pipeline Co. (1.66 percent). In an undivided interest, as opposed to a stock-type, pipeline, each interest owner constitutes a separate carrier, each having an individual tariff and each being in competition with the others for traffic and customers.

[2] 43 U.S.C. § 1651, Pub. L. 93-153, 87 Stat. 584.

[3] Under the Interstate Commerce Act ("Act"), 49 U.S.C. § 1 et seq., any "common carrier engaged in . . . the transportation of oil . . . by pipeline" is subject to regulation by the ICC. Section 6(1) of the Act, 49 U.S.C. § 6(1), requires each such carrier to publish tariffs "showing all the rates, fares, and charges for transportation between different points on its own route. . . ." The ICC's jurisdiction over common carrier oil pipelines has since been transferred to the Department of Energy and the Federal Energy Regulatory Commission pursuant to Sections 306 and 402(b) of the Department of Energy Organization Act, Pub. L. 95-91, 91 Stat. 565, 42 U.S.C. §§ 7155, 7172(a).

barrel. Each of the other TAPS owner companies likewise filed individual tariffs, stating rates ranging from $6.09 to $6.44 per barrel. On June 15, 1977, protests challenging the initial tariffs were submitted by the State of Alaska, the Bureau of Investigations and Enforcement of the ICC, the Antitrust Division of the United States Department of Justice, and the Arctic Slope Regional Corporation (an organization of native Alaskans). Each of the protests sought suspension of the tariffs and the imposition of varying levels of interim rates. Pursuant to a schedule established by the Commission, replies to the protests were filed on June 22 and a non-evidentiary hearing, consisting solely of oral argument, was held by the Commission on June 27.[4]

On June 28, 1977, the Commission rendered its decision. *First*, it concluded "that there has been a sufficient showing of probable unlawfulness to warrant the institution of a formal investigation concerning the proposed rates," and directed the commencement of such an investigation. *Second*, it ordered the proposed initial rates suspended pending the outcome of the investigation, for a period not to exceed the statutory suspension limit of seven months. *Third*, the Commission prescribed interim rates to be effective during the suspension period, and authorized the TAPS carriers to file tariffs reflecting such rates on one day's notice. The rates prescribed by the Commission ranged from $4.68 to $5.10 per barrel, with ARCO Pipe Line authorized to file at a rate of $4.91 per barrel. The interim rate prescribed for ARCO Pipe Line was thus 18.7 percent below that contained in its initial tariff. *Finally*, the Commission ordered that as a condition to filing interim rates, the carriers keep account of all amounts collected and agree to refund any portion of such amounts ultimately held to be excessive.

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[4] Evidentiary hearings are foreclosed by the ICC's rules governing tariff suspensions.

Several carriers, including ARCO Pipe Line, thereafter filed with the Fifth Circuit petitions for review of the Commission's decision. ARCO Pipe Line's petition, filed on July 13, 1977, and its request for an interlocutory injunction, filed on July 14, 1977, challenged the decision principally on the grounds that both the Interstate Commerce Act and the Due Process Clause prohibit the Commission, prior to a full investigation and hearing, from prescribing rates; that in any event, the Act does not permit the Commission to suspend initial, as opposed to "changed," rates; and that the rates prescribed by the Commission were confiscatory. ARCO Pipe Line also contended that the ICC's purported requirement that the carriers transport oil at the prescribed rates [5] would impose irreparable harm upon it, because it would be unable as a matter of law to recover any revenues lost if the interim rates were held to be unreasonably low. ARCO Pipe Line noted, however, that no harm would result to any of the protestants or to the public interest if the initial rates were permitted to go into effect, because under the statutory scheme ARCO Pipe Line would be subject to a liability for "reparations" to the extent its rates were found unreasonably high.[6]

In expedited proceedings, the Fifth Circuit, on July 19, 1977, heard oral argument on the petitions for review and on the motion of the United States to dismiss the

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[5] The Commission, of course, left the carriers with the option of not filing interim rates, thereby precluding the shipment of Prudhoe Bay oil pending the outcome of the tariff suspension proceeding.

[6] ARCO Pipe Line further pointed out that the interests of consumers are not affected by the tariff level. The price of crude oil delivered to the lower 48 states is fixed by the level of world prices, and is not affected by transportation costs. Such transportation costs do directly affect the wellhead value of the oil at the North Slope of Alaska. The State of Alaska has a one-eighth royalty share of the oil produced and a severance tax based upon wellhead value. Hence, the State is motivated to minimize the pipeline tariff in order to increase the wellhead value.

petitions. On July 29, in a 2-1 decision (Judge Roney dissenting), the court granted the motion to dismiss. The majority held that while the statute permits the ICC to prescribe rates only after a full hearing, the Commission may nonetheless lawfully establish rates as an incident to its suspension power. The court similarly upheld the imposition of a refund obligation as a proper incident to the suspension power, despite the fact that the statutory provision authorizing refunds does not extend to initial rates.

Judge Roney, dissenting, defined the Commission's order as rate-making. Judge Roney premised his dissent upon the rule that the Commission may prescribe rates only upon a finding that the proposed rates are unreasonable, and then only after a full evidentiary hearing. He noted the inequity of depriving the carriers of recoupment if the prescribed rates are found to be too low, while requiring them to make refunds if the rates are unlawfully high, and concluded that the case should have been remanded to the Commission for further consideration.[7]

REASONS FOR GRANTING THE WRIT

As noted by Judge Roney, the Commission's action challenged herein presents "a situation never previously confronted by the courts." App. at 18a, 557 F.2d at 802. Suspension of the TAPS tariffs permitted the Commission to put the carriers to the unprecedented choice between refiling at prescribed "interim" rates averaging nearly 20 percent below those which had originally been submitted, or not transporting any North Slope oil at all and suffering massive losses on an $8 billion investment.

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[7] On September 8, 1977, the Fifth Circuit denied the motion for rehearing, and the suggestion for rehearing en banc, filed by BP Pipelines Inc. On that same day, the Court denied Union Alaska Pipeline Company's petition for review which had been transferred to the Fifth Circuit after the Court's consideration of the earlier-filed petitions for review.

The Commission's Order was premised on two erroneous assumptions: (1) that the Commission has the power to suspend an initial, as opposed to a changed, rate, and (2) that the Commission can, prior to a full hearing, effectively prescribe a rate by requiring ARCO Pipe Line to elect between not operating at all[8] and "voluntarily" refiling at a lower rate named by the Commission. Both assumptions are invalid. The Fifth Circuit attempted to overcome these deficiencies by ignoring the provisions of the Interstate Commerce Act, and, in effect, invoking a rate-making scheme of its own invention. The resulting suspension of the TAPS carriers' lawful initial tariffs, and coercive prescription of interim rates, does violence to ARCO Pipe Line's statutory and constitutional rights.

I. THE COMMISSION DOES NOT HAVE AUTHORITY TO PRESCRIBE A RATE WITHOUT A FULL HEARING

Central to the statutory rate-making scheme is the proposition that rates are to be fixed by the carrier in the first instance. *See, e.g., Arizona Grocery Co.* v. *Atchison, T. & S.F. Ry.*, 284 U.S. 370, 384 (1932); *Hanna Mining Co.* v. *Missouri Pac. R.R.*, 332 I.C.C. 166, 171 (1968). Under Section 15(1) of the Act, 49 U.S.C. §15(1), the Commission is not itself empowered to prescribe rates, except on review of those established by the carrier, and then only after "full hearing" and a finding that the rate fixed by the carrier "is or will be unjust or unreasonable . . . or otherwise in violation of [the Act]."

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[8] Under the Act, a carrier is not permitted to transport oil by pipeline in interstate commerce unless it has on file an effective tariff. 49 U.S.C. § 6(7). Accordingly, the suspension of an initial tariff renders the carrier unable to transport over the subject route during the period of suspension. This is to be contrasted with the suspension of a *changed* tariff, the effect of which is to require the carrier to revert to the terms of the tariff theretofore in effect.

The logic of the Fifth Circuit's opinion is that the suggestion of an interim rate does not amount to an unlawful prescription but rather is a lawful incident to the power to suspend. There is a total absence of support for that theory in the Interstate Commerce Act, and in the circumstances of this case the Fifth Circuit's approach has plainly undermined the statutory rate-making process.

Under Section 15(1) the Commission cannot prescribe rates (whether denominated "interim" or not) on a summary examination of tariffs, or on a mere suspicion that they are too high; to the contrary, it must afford a full hearing to consider the lawfulness of the proposed rates.[9] This Court has made clear that this is not a technical requirement, but a mandate that a truly "ample opportunity [be] afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety from the standpoint of justice and law, of the step asked to be taken." *Akron, C. & Y. Ry.* v. *United States (The New England Divisions Case)*, 261 U.S. 184, 200 (1923).

The history of this case lays bare the Commission's plain failure to comply with that mandate. The skeletal, conclusory submissions which the Commission had before it at the time of its decision can hardly be said to constitute the full record that the statute requires before a rate can be prescribed. Indeed, the Commission was at an even greater disadvantage here than in the ordinary case. The initial tariffs at issue before the Commission concerned a new pipeline, transporting goods over a route previously not available to shippers, and presenting unprecedented cost and regulatory factors. Thus there was no useful closely comparable experience upon which the

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[9] At that required hearing, the burden is squarely on the protestants to prove the unlawfulness of the initial rate. 49 U.S.C. § 15(7).

Commission might have drawn to arrive at a range of presumptively lawful rates.

To avoid the implications of these circumstances, the Fifth Circuit majority was forced to create a legal fiction, and to theorize that the Commission had not in fact prescribed rates, but rather had "partially waive[d] the suspension power" by announcing "that if [the carriers] would file interim tariffs at or below Commission-announced ceilings the Commission would not unconditionally suspend the tariffs originally fild." App. at 13a, 557 F.2d at 782. That view was principally grounded on a patent misreading of this Court's decision in *United States* v. *Chesapeake & O. R.R.*, 426 U.S. 500 (1976) (*"C&O"*).

C&O involved the lawfulness of a Commission order conditioning a decision not to suspend increased rates on the requirement that the carriers devote the revenues added by the increases to the purposes which had been proffered in support of those increases. This Court approved that condition as within the Commission's suspension authority:

> The railroads had made the representation that the increase was justified, at least in part, by the need to take care of deferred maintenance and deferred capital expenditures. If the railroad did, in fact, use the increased revenues for such purposes, the Commission perceived no reason to impose a suspension of the tariff or to undertake a lengthy investigation and, consequently, no reason to frustrate the clear congressional intent that "just and reasonable rates" be implemented. [426 U.S. at 514.]

In short, the Commission and the Court "simply held the railroads to their representation that the increase was justified by needs in these two areas." 426 U.S. at 515. No tampering with the carrier-set rate was suggested; the alternatives available to the Commission with respect to the rate remained either acceptance or suspen-

sion. It is a large, and we submit unwarranted, leap from the narrowly constrained logic of *C&O* to this case, in which the conditions imposed go to the level of the rate itself. In the present case, the "condition" constitutes a blatant avoidance of the statutory requirement of a full hearing as a prerequisite to the prescription of rates. *C&O* offers no support for that approach.

To the contrary, the decisions of this and other courts strictly and properly hold the Commission to the limited rate-making power granted it by the Interstate Commerce Act.[10] In *Atchison, T. & S.F. Ry.* v. *United States*, 284 U.S. 248, 262 (1932), for example, this Court noted that the ICC, "exercising a delegated regulatory authority . . ., operates in a field limited by constitutional rights and legislative requirements. . . . In the discharge of its duty [under Section 15(1)], a fair hearing is a fundamental requirement." This requirement had been earlier detailed in *ICC* v. *Louisville & N. R.R.*, 227 U.S. 88 (1913), where the Court found that Section 15(1) guarantees a full hearing, which must include the right to "be fully apprised of the evidence submitted or to be considered, . . . to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal." 227 U.S. at 93.

Attempts to circumvent these requirements through self-serving agency rationalizations have been flatly rejected. Most prominent in this regard is *Moss* v. *CAB*, 430 F.2d 891 (D.C. Cir. 1970). There, the major domestic

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[10] In *ICC* v. *Cincinnati, N.O. & T.P. Ry.*, 167 U.S. 479, 494 (1897), a case that arose prior to the passage of the Hepburn Act (which amended the Interstate Commerce Act to add the prescription power now contained in Section 15(1)), this Court rejected the contention that the Commission's authority to award reparations for past overcharges included a power to prescribe rates for the future. In so doing, it noted that the power to set rates "is so vast and comprehensive, so largely affecting the rights of carrier and shipper" that it "is never to be implied."

air carriers filed with the Civil Aeronautics Board tariffs that provided for rate increases. After oral argument scheduled on its own motion, the Board found that the tariffs "may be" unlawful and ordered the tariffs suspended and investigated. It further found, however, that the carriers had demonstrated a need for some additional revenue. It therefore "outlined its own fare formula and announced its decision to 'permit tariff filings implementing' that formula to be filed without suspension . . . ." 430 F.2d at 894-95. The Board stated that it "would 'be disposed to grant an increase'" which adhered to its plan, *id.* at 896, but warned that rates above the prescribed maximum "would be viewed *prima facie* as outside the realm of justness and reasonableness and would ordinarily be suspended and ordered investigated." *Id.* at 897. The carriers thereafter withdrew their tariffs and substituted new tariffs in accordance with the Board's plan.

On review of the Board's order, the Court of Appeals reversed. It flatly rejected the Board's contention that, because the carriers were not legally bound to refile in compliance with the formula set out in the Board's order, there had been no prescription of rates. The court characterized this as a "legalistic reading of the statute," *id.* at 895, concluding that "these rates . . . have been determined by the Board . . . ." *Id.* at 896. The Court observed:

> It would be blinking reality to hold, as the Board argues, that the order of September 12 did no more than suspend and initiate an investigation of the rates proposed by the carriers. . . . The Board did all that it could, short of formally styling its order as rate-making, to induce the carriers to adopt the proposed rates. [430 F.2d at 897-98.]

The Commission's Order and the Fifth Circuit's opinion reflect an approach parallel to that rejected in *Moss*.[11] As in *Moss*, 430 F.2d at 896-98, "[i]t would be blinking reality" to conclude that authorizing leave to refile at the specified interim rate constitutes anything less than the *de facto* prescription of rates by the Commission without a full and fair hearing.[12] Judge Roney correctly concluded in his dissent below that "[t]his is ratemaking. We should not hide from that fact." App. at 17a, 557 F.2d at 802.

Here, the imposition of a "suggested" rate produces precisely the sort of coercion, with all of the attendant risks, that concerned the *Moss* court.[13] Even more so than

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[11] ARCO Pipe Line recognizes the factual distinctions drawn by the Fifth Circuit and the Commission between the present case and *Moss*. There is no question that certain aspects of *Moss* are not directly transferable to the instant situation. The critical importance of *Moss*, however, lies not in its status as controlling precedent, but in its enunciation of certain fundamental principles that bear generally on the matter of improper agency action. *Moss*, in short, did not alter the law, but rather articulated the practical standards against which the real impact of agency actions are to be judged.

[12] To the extent that evidence beyond the order itself is necessary in support of this proposition, the Commission itself supplied it at the final closed meeting prior to issuance of its suspension order. The transcript of that meeting was furnished by the Commission in response to a Freedom of Information Act request, and is reproduced in relevant part at Appendix B. Included therein is a discussion which discloses that the initial draft decision had spoken of the "specifying" of rates. That was changed to "authorizing" in the final draft because, as stated by one staff member, "[w]e felt that was more consistent with a lack of prescription." App. at 29a. That same staff member also advised the Commission that while it might be acceptable to use "specify" in the text of the order, it would be better not to use it in a heading. App. at 31a. These passages plainly reflect that the Commission perceived no substantive difference between authorizing and prescribing rates, and was drawing the distinction solely in the hope of avoiding the *Moss* rule and the plain requirements of the Interstate Commerce Act.

[13] Subsequent cases have read *Moss* as permitting judicial statutory scrutiny of "'sham' suspensions aimed at coercing behavior

in *Moss*, the Commission here was acting with a nearly total absence of relevant facts. In addition, the matters that a full investigation and hearing would necessarily inquire into are unusually complex, difficult and novel, and the Commission lacked the pool of applicable acquired experience which it has in most matters before it and which the CAB had in *Moss*. Thus, on the present state of the record, the "suggestion" of rates by the Commission was without basis, and completely subverted the statutory scheme.

This prescription of rates, backed by a suspension of the initial tariffs, placed ARCO Pipe Line in a grossly unfair position. Its only alternatives were to hold to the initial tariff, and thereby face a seven-month suspension during which it could carry no Alaskan oil and would suffer massive financial losses, or to accede to and adopt the Commission's "suggested" rate. The economic coercion is apparent. *Cf. Consolidated Edison Co.* v. *FPC*, 512 F.2d 1332, 1340-41 (D.C. Cir. 1975). Under the Commission's approach, ARCO Pipe Line's discretion to set rates, as guaranteed by the Act, has been "so circumscribed as to [be] almost nonexistent." *National Association of Motor Bus Owners* v. *FCC*, 460 F.2d 561, 567 (2d Cir. 1972).

Simply stated, the Commission has forced the TAPS owners to choose between (1) allowing an $8 billion investment to remain idle, thereby delaying the arrival of North Slope oil and the accompanying balance of payments benefits, or (2) bowing to economic coercion and agreeing to refile at the lower rates. The "authorization

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rather than merely preserving the status quo pending investigation." Continental Airlines v. CAB, 522 F.2d 107, 129 (D.C. Cir. 1975). In SCRAP v. United States, 346 F. Supp. 189 (D.D.C. 1972) (three-judge court), *rev'd on other grounds*, 412 U.S. 669 (1973), the court stated that "[a] suspension decision which effectively blackmails the carriers into submitting agency-authored rates is functionally indistinguishable from an agency order setting those rates. . . ." 346 F. Supp. at 197.

to refile" is thus tantamount to the Commission's prescription of a rate without a proper, full hearing, a result which Section 15(1) and the *Moss* case clearly forbid.

II. THE COMMISSION DOES NOT HAVE AUTHORITY TO SUSPEND AN INITIAL RATE

Underlying the Fifth Circuit's approach to the prescription by the Commission of interim rates was the view that the Commission had the threshold authority to suspend initial, as opposed to changed, rates. The Court of Appeals stated that the language of the Act "has no plain meaning" and that the "statutory history . . . yields little insight," App. at 11a, 557 F.2d at 781, but concluded that "it would be illogical to assume that Congress intended to leave such a gap in the legislative scheme." App. at 12a, 557 F.2d at 782. To the contrary, the relevant statutory language, its legislative history, and the statute's overall rate-making framework all suggest that Congress intentionally limited the suspension power to changed rates.

Section 15(7) of the Act, 49 U.S.C. § 15(7), provides, in part:

> Whenever there shall be filed with the Commission any schedule stating a *new individual or joint rate*, the Commission shall have . . . authority . . . to enter upon a hearing concerning the lawfulness of such rate, . . . and pending such hearing and the decision thereon, the Commission . . . may . . . *suspend the operation of such schedule and defer the use of such rate*, . . . but not for a longer period than seven months beyond the time when it would otherwise go into effect. . . . [Emphasis added.]

While the Commission found comfort in the use of the word "new," a reading of Section 15(7) in its entirety indicates an interchangeability between that word and the term "changed rate," which also appears in the sec-

tion. See App. at 38a-40a.[14] The Commission recognized this principle early in the Act's existence, when it held that "[b]y [Section 15(7)] we are given authority to determine the 'lawfulness' of a 'new' rate, *whether it be increased or decreased.*" *Salt From Louisiana Mines to Chicago, Ill., St. Louis, Mo., and Intermediate Main Line Points*, 69 I.C.C. 312, 313 (1922) (emphasis added).

In addition to the language of Section 15(7), the legislative history of that provision is wholly consistent with the view that Congress was limiting the suspension power to changed rates. The genesis of the suspension provision was the Commission's frequently expressed view that, in order adequately to prevent railroad abuse of shippers, it required authority to restrain "advances," or increases, in rates. The most effective grant of authority, the Commission suggested, would be the power to maintain the "status quo while proceedings are pending to test the reasonableness of the *advance.*"[15] Congress responded by passage of the Mann-Elkins Act,[16] which added Section

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[14] Even more telling is the untenable result that would occur under the Commission's interpretation of the term "new" rate. The second sentence of Section 15(7) provides that if, during the seven-month suspension period, "the proceeding has not been concluded and an order made . . ., *the proposed change of rate* . . . shall go into effect at the end of such period." (Emphasis added.) The statute makes no similar provision for anything other than a "changed" rate. Under settled Commission law, a "changed" rate is one that modifies an existing rate of the same nature. *See, e.g.*, Animal Food, Middlewest to California, Idaho, and Utah, 332 I.C.C. 87, 88 (1967). The term "change" of rate thus excludes an "initial" rate. As a result, either the term "new" rate must be read as synonymous with a "changed" rate (*i.e.*, not an "initial" rate) or the Commission would be faced with an anomalous situation where the suspension power would be applicable to an "initial" rate but the seven-month limitation would not.

[15] *See, e.g.*, TWENTY-FIRST ANNUAL REPORT OF THE INTERSTATE COMMERCE COMMISSION 9-10 (1907) (emphasis added).

[16] 36 Stat. 539 (1910).

15(7) to the Act.[17] The resulting use of the terms "new" and "changed" rates cannot be viewed as insignificant.

While the Commission on occasion has nevertheless asserted the authority to suspend initial tariffs, the circumstances of those cases themselves illustrate that the suspension power does not extend to initial tariffs of the type now before the Commission. Unlike the present case, none of those cases resulted in an order that would have had the effect of entirely precluding the transportation of the goods.[18] Rather, all of those cases involved initial tariffs that were simply designed to add some new service to the carrier's existing business on the same general route, and indeed, in some of the cases the particular respondent was able to move the goods in an alternative manner.[19]

The significance of these distinctions is that they emphasize the fact implicitly recognized by both the Commission and the Fifth Circuit—that suspension is a wholly inappropriate remedy in response to an initial tariff of this sort, where the effect would be to restrain entirely the interstate movement of any North Slope oil, either by ARCO Pipe Line or any other carrier. None of the protestants at the Commission level seriously argued that the various initial tariffs should be made subject to an outright seven-month suspension during which no rates would be in effect and no interstate transportation of the petroleum would be possible. Rather, they all proposed, and the Commission utilized, suspension solely as a device

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[17] *See generally*, 1 I. SHARFMAN, THE INTERSTATE COMMERCE COMMISSION 201-02 (1931); Arrow Transportation Co. v. Southern Ry., 372 U.S. 658, 662-66 (1963).

[18] *E.g.*, Foodstuffs and Agr. Commodities, Cal., and Ariz., to W. & S., 329 I.C.C. 321 (1966); Animal Feed From Miss. and Tenn. to Midwest and S.W., 316 I.C.C. 94 (1962).

[19] *E.g.*, Animal Food, Middlewest to Calif., Idaho, and Utah, 332 I.C.C. 87 (1967); Cotton from New Orleans, 49 I.C.C. 751 (1918).

to impose unlawful interim tariffs. The Commission lacks authority to adopt that approach. The Act requires it to allow the tariffs to go into effect pending an investigation into the lawfulness of the rates.

III. THE COMMISSION DOES NOT HAVE AUTHORITY TO IMPOSE A REFUND OBLIGATION AS A CONDITION TO AN INITIAL TARIFF

Apart from the circumvention of the statutory provision regarding prescription of rates, the Commission, and in turn the Fifth Circuit, found within the powers ancillary to the suspension authority the ability to impose a refund obligation in an initial tariff. In so doing, the unequivocal language of the Act has been wholly ignored. In addition, the Commission has thereby run afoul of the principle frequently expressed by this Court that a government agency cannot achieve indirectly what it is prohibited from doing directly.

The Commission's suspension order states that:

> as a condition to filing . . . interim rates, we will require that the carriers keep account of the amounts collected under the interim rates or the proposed rates should they become effective and that they agree to refund any portion of such amounts that may ultimately be established as excessive.

This provision is in direct, indisputable conflict with Section 15(7), which by its terms expressly limits the authority to order refunds to a "proposed *increased* rate or charge." App. at 39a (emphasis added).

In the face of that statutory limitation, the Commission itself expressed serious doubts as to its power to order refunds as a condition to the filing of initial rates. At the final closed meeting of the Commission prior to issuance

of its suspension order,[20] the Commission's General Counsel referred to the authority to impose a refund provision with respect to initial tariffs as "doubtful," but concluded that "insofar as the refund provision is made a condition of the willingness of the Commission to accept a lower filed rate in the interim, that may get us over that hurdle." App. at 34a. Another staff member referred to the refund provision as a "sort of quid pro quo for allowing [the carriers] to have these interim rates." That same staff member then advised the Commission that "[t]he problem with the refund provision is our statutory authority is somewhat questionable . . . . [T]he statute refers to refunds in the case of increased rates. Here you have initial rates, but if we do it as part of allowing interim rates instead of a suspension, I think we're within reasonable limits." App. at 35a.

The Commission, in short, was consciously sidestepping the plain language of the Act when it included the refund condition. As in its use of the term "authorized," *supra* at note 12, the Commission, by a careful choice of words, sought to achieve a result unmistakably prohibited by the statute. The regulatory framework as devised by Congress cannot be permitted to be evaded in this manner, where the effect is to infringe so directly petitioner's rights.

The Fifth Circuit similarly expressed doubts as to its "power to require the carriers to establish refund provisions with respect to the originally filed rates." App. at 16a, 557 F.2d at 783. It too overcame those doubts, however, through the use of a long-discredited syllogism which reasons that "if the legislature may withhold a particular

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[20] See note 12, *supra*. It should be noted with respect to both this and note 12 that the transcript of this meeting became available only after the Fifth Circuit's decision was rendered. Thus, while the material contained in Appendix B is not of record, it is public matter, furnished by the Commission itself, and thus its authenticity is not subject to question.

benefit, it may grant it in a limited form since the greater power of withholding absolutely must necessarily include the lesser power of granting with restrictions," Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595, 1595 (1960). This is true, the reasoning continues, even where those restrictions could not be imposed directly. "The potential erosion of fundamental liberties through the use of this bargaining technique has prompted the development of the doctrine of 'unconstitutional conditions.'" *Id.* at 1596.

This Court articulated the concept of unconstitutional conditions in response to a number of instances of exploitation of power where the extension of governmental benefits was conditioned upon the surrender of constitutional rights.[21] The thrust of those decisions is that a "constitutional power cannot be used by way of condition to attain an unconstitutional result." *Western Union Telegraph Co.* v. *Foster*, 247 U.S. 105, 114 (1918). As a corollary, this Court has repeatedly enunciated the rule that a government agency cannot be allowed to impose a condition which would "produce a result which [it] could not command directly." *Speiser* v. *Randall*, *supra*, 357 U.S. at 526. There is no sound reason why these principles should apply with less force to situations in which statutory, rather than constitutional, bounds have been exceeded.

In the present case, the Commission has asserted its power to suspend the carriers' initial tariffs and to authorize the filing of interim tariffs at specified lower rates

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[21] *E.g.*, Graham v. Richardson, 403 U.S. 365 (1971) (conditioning entitlement to welfare benefits on citizenship or fifteen-year residency for aliens); Sherbert v. Verner, 374 U.S. 398 (1968) (conditioning unemployment compensation on agreement to accept employment in derogation of religious beliefs); Speiser v. Randall, 357 U.S. 513 (1958) (conditioning tax exemption on inhibition of freedom of speech).

in their stead. By conditioning the non-suspension of either of such tariffs upon the inclusion of an unlawful refund provision, the Commission has interfered with the carriers' statutory rights in much the same way that the conditioning of governmental benefits was found to interfere with individuals' constitutional rights. This Court should recognize the dangerous consequences which the sanctioning of this approach could readily produce. The Commission must be held to the terms of its statute and must be required to permit the filing of initial tariffs without imposition of an unlawful refund provision.

CONCLUSION

For the foregoing reasons, petitioner ARCO Pipe Line Company respectfully prays that this Court grant this petition for a writ of certiorari to review on the merits the issues raised.

Respectfully submitted,

Of Counsel:

JOHN T. UPDEGRAFF
ARCO Pipe Line Company
ARCO Building
Independence, Kansas
67301

ROBERT E. JORDAN, III
JAMES H. PIPKIN, JR.
STEVEN H. BROSE
STEPTOE & JOHNSON
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 862-2000

Attorneys for Petitioner
ARCO Pipe Line Company

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of October, 1977, a copy of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was served by hand upon all counsel of record below and upon the Solicitor General of the United States.

/s/ Robert E. Jordan, III
ROBERT E. JORDAN, III
STEPTOE & JOHNSON
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036

Attorney for Petitioner
ARCO Pipe Line Company